IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

GUARDIANSHIP PETITION NO.100 OF 2004

In the matter of Guardianship and Wards Act, 1890.

And

In the matter of Appointment of Guardians for the New Born Male Child (Now known and named as FARAZ and formerly named as SOHAIL) of Abdul Kadir Karim Shaikh and Zakiyab Abdul Kadir Shaikh

1. Zaveed Pharukh.
2. Shirlina Mohammed
both having their residence at 1720, Crownover Road, Houston Texas 77080 and presently at C/o Pramila Farooqui, 198, Aram Nagar, Part II, Versova Road, Andheri (West) Mumbai.
3. Abdul Kadir Karim Shaikh
4. Zakiyab Abdul Kadir Shaikh
both permanently residing at Room No.1, Ganesh Nagar, B.J. Road Bandstand, Bandra (West) Mumbai - 50 ..Petitioners.

Mr.R.I.Chagla with S.N.Vimadalal i/b.M/s.Vimadalal & Co. for the Petitioners.

Mrs.M.S.Diwan, Amicus Curie appointed by the Court present.

CORAM: S.U. KAMDAR, J.
DATED: 30TH NOVEMBER, 2004

ORAL JUDGMENT :

By the present Petition, the Petitioner Nos.1 and 2 seeks relief that they should be declared as guardians of the wards viz. Faraz (formerly known as Sohail). The Petitioner Nos.3 and 4 are the natural guardians viz. the mother and the father. The child is born on 2.5.2004 and thus, is about six months of age. The Petitioner Nos.3 and 4 have also other three children known as daughter Roobina, who is around 12 years old, son Farook, who is about 10 years old, another son Iqbal, who is around 5 years old.

2. The Petitioners Nos.1 and 2 are residing at Houston Texas in the United States of America. The Petitioner No.1 is a citizen of India and the Petitioner No.2 is the citizen of United States of America. They are both husband and wife. According to the Petitioner, the Petitioner Nos.1 and 2 are wealthy having assets of about US $ 4,000,000. The Petitioner No.2 is a qualified bachelor in Business Management. According to the Petitioner, they are desirous of adopting a child since they are without any issue and the Petitioners Nos.3 and 4 have given their consent that the child viz. Faraz should be adopted by the Petitioner Nos.1 and 2. In paragraph 4 of the Petition, it has been inter-alia stated

that the Petitioner No.3 is a labourer who does household chores and the Petitioner No.4 is a housewife . They are both illiterate and they have a very low income and are not in a position to maintain their newly born child. On the basis of the aforesaid averments, the Petitioners Nos. 3 and 4 are supporting the Petitioner Nos.1 and 2 for being appointed as a guardian.

3. The learned counsel for the Petitioner has stated that this appointment of the guardian is a step towards ultimately adoption of the said child by the Petitioner Nos.1 and 2. According to him, under the Canadian Law unless the parents are appointed first as the guardians, it is not possible for them to adopt the child and, therefore, the present Petition is filed as a step towards ultimate adoption of the newly born child.

4. The learned counsel for the Petitioner, who has appeared before me, strongly urged that I should allow the present Petition because the Petitioners Nos.3 and 4 being the natural guardians have given their consent for appointment of the Petitioners Nos.1 and 2 as guardians of the newly born male child Faraz. He has also urged before me that the

ultimate welfare and interest of the said newly born child Faraz is in appointing the Petitioner Nos.1 and 2 as guardians. He has further contended that Petitioner Nos.3 and 4 are unfit to be appointed and/or continued as guardian though they are natural guardian because they are financially too poor to look after the welfare of the said child Faraz.

5. The learned counsel for the Petitioner has further inter-alia contended that while appointing the guardian the Court must take into consideration only the provisions of sections 7 and 17 of the Guardians and Wards Act, 1890 and, in accordance therewith, should appoint the guardian by keeping in mind the ultimate interest of the child. According to the learned counsel for the Petitioner, the interest of the child will be best served by appointing the Petitioner Nos.1 and 2 because they are financially sound and are in a position to look after the future need of the said child and, therefore, the Petitioner Nos.1 and 2 should appointed as guardians.

6. Vazifdar, J. has by an earlier order appointed Ms.Madhavi Diwan as an Amicuis Curie in the present matter. The learned counsel has placed before me

her arguments and has contended that the Court should take into consideration the provisions of section 19 of the Guardians And Wards Act, 1890 particularly, sub-clause (b) thereof. The learned counsel has contended that under the provisions of section 19(b) of the Guardians And Wards Act, 1890 if the natural guardians, including the father of the child is alive, then they should be appointed as natural guardian and no other person shall be appointed unless the Court comes to the conclusion that the father is unfit to look after the said child. According to the learned counsel Ms.Diwan, Amicuis Curie, this Court ought not to exercise the jurisdiction to appoint Petitioner Nos.1 and 2 as guardians merely because they are financially very sound and it cannot be presumed that because of the financial position of Petitioner Nos.1 and 2 the child Faraz would be better looked after.

7. The learned counsel for the Petitioners has contended that under the provisions of section 19 of the Guardians and Wards Act, 1890 even if the father is alive, the Court has the jurisdiction to appoint a guardian if the father has given his consent for appointment of somebody else as a guardian of the child and, according to him the natural guardians

are the best persons to ascertain the actual welfare of the child and, if their opinion outsiders could look after the said child better, then it is not for the Court to give its view about the welfare of the child and this Court must pass an order as prayed in the present Petition.

8. The learned counsel for the Petitioners has in support, relied upon the High Court Rule 321 which has been framed pursuant to section 50 of the Guardians and Wards Act VIII of 1890. He has particularly relied upon sub-clause (2) of the said rule. The said sub-clause (2) reads as under :

> "(2) When the natural guardian of the minor is not proposed for being declared or appointed guardian, the applicant shall state the facts relied upon for showing that such person is unfit to act as guardian of the minor, or that the consents to the application."

9. He has further contended that similar rule has been incorporated by the various High Courts in the rules framed by them in exercise of the power confirmed under the Guardians and Wards Act, 1890. He has contended that once there is the consent of the applicant by the natural guardian then in that

event a person should be appointed as a guardian without looking into the other aspect of the matter. The learned counsel for the Petitioner in support of the aforesaid contention has also relied upon the following judgments. He has relied upon judgment in the case of *Radhibai v. Vasanmal, AIR 1917 Sind, 76* particularly page 78 and has contended that the Court could not reject the application merely on the ground that it is not shown under clause 19(b) that father is unfit and it is the Court who has to determine the welfare of the child by taking into consideration sections 17 and 19 of the Act. He has further contended on the basis of the aforesaid judgment that the provisions of section 19(b) and section 17 must inevitably be read together and, therefore, the Court cannot by looking at section 19(b) itself, reject the application of the Petitioners on the ground that the father is available and is not unfit.

10. The learned counsel has thereafter relied upon a judgment of the Calcutta High Court in the case of *Lovejoy Patell & Anr.*, reported in *AIR 1944, Calcutta, 433*, particularly the grounds which are set out for exercise of power under paternal jurisdiction over the infants by the Court of

Chancery in England and has contended that two grounds viz.(i) the waiver of their rights by the natural guardian by permitting the child to be brought up in higher position and (ii) agreement between the husband and wife on marriage or on separation or agreement by father with a third party should be sufficient ground for appointment of a third party as guardian.

11. According to the learned counsel for the Petitioner the grounds which are available to the Court of Chancery are also equally available to this Court under the provisions of section 17 of the Guardians and Wards Act, 1890. Thus, according to him, even if the father is not unfit, as contemplated under section 19(b), it is open to the Court to appoint any other person as a guardian under section 17 of the Guardians and Wards Act, 1890.

12. The learned counsel for the Petitioners thereafter relied upon a judgment in the case of *Anokha (Smt.) v. State of Rajasthan & Ors.,* reported in *(2004) 1 Supreme Court Cases, 382* and another judgment of the Apex Court in the case of *Laxmi Kant Pandey v. Union of India* reported in *AIR*

1984 Supreme Court, 469. By relying upon the aforesaid four judgments, the learned counsel for the Petitioners has contended that if there is consent on the part of the parents and if in view of the parents which are the natural guardians, the child's welfare is better served by appointing somebody else as guardian then in that event, this Court ought not to hesitate in exercising jurisdiction under the Guardians and Wards Act, 1890. The learned counsel for the Petitioners has thereafter relied upon a judgment of the Single Judge of this Court in the case of *Mohammad Shafi v. Shamin Banoo* reported in *AIR 1979 Bombay, 156* particularly paragraphs 10, 11 and 12 of the said judgment and has contended that the bar contained in section 19 ought not to be taken into consideration when there is a consent by the natural guardian for appointment of the third party as a guardian.

13. On the other hand, Ms.Diwan, the learned counsel appearing as Amicuis Curie has brought to my attention the judgment of the Privy Council in the case of *Mrs.Annie Besant v. G.Narayaniah & Anr.*, reported in *AIR 1914 Privy Council, 41* and has contended that the authority clearly specifies that the power of the Court to appoint guardian in cases

where natural guardians are alive, arises only if the father is unfit, as contemplated under section 19(1)(b) of the Guardians and Wards Act, 1890 and only after considering the said aspect and satisfying itself about the same that the Court can go into the next stage of enquiry of the welfare of the child. It is therefore urged by the learned counsel Ms.Diwan that the Court must first consider whether the ground is sufficiently made out to ignore the existence of natural guardian and appoint some third party as a guardian under the Guardians and Wards Act, 1890.

14. Before I go into the merits of the rival contentions, it is necessary that the relevant provisions of the Guardians and Wards Act, 1890, particularly sections 17 and 19 are set out. Accordingly, I reproduce section 17 and 19 of the said Act which are relevant for the purpose of determination of the present case :

> "**17. Matters to be considered by the Court in appointing guardian.**-(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is

subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) * * * * *

(5) The Court shall not appoint or declare any person to be a guardian against his will."

19. Guardian not to be appointed by the Court in certain cases.-Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person-

(a) of a minor who is a married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person, or

(b) * * * of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is

> under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

15. The contention of the learned counsel that rule 321 framed under section 50 provides that when the natural guardian of the minor is not proposed for being declared or appointed as guardian then the applicant shall state the facts relied upon for showing that such person is unfit to act as guardian of the minor, or that the natural guardian consents to the application, in itself indicates that where there is a consent of natural guardian then the provisions of section 19 of the Guardians and Wards Act, 1890 need not be adhered to, is in my view, an erroneous interpretation of the section and the said rule. In my opinion, the provisions of rule 321 are merely enabling provisions. A plain reading of sub-rule (2) of rule 321 only provides what are the facts which are required to be stated in the Guardianship Petition while making an application. The same being procedure rule, it does not and cannot over-rule the provisions of section 19(b) of the Act. The mandate of the section requires that if the father is living then the Court must go into the fact that such a person is unfit to be appointed

as guardian of the minor or not. The sub-rule (2) of Rule 321 does not provide that if there is a consent then the Court must grant such a Petition for appointment of the guardian ipso facto without going into any further requirement, what should be stated in the Petition is as mere a requirement of a format and not a substantive law. In my view therefore the provisions of section 19(b) are required to be satisfied even if there is a consent of natural guardian. If the father is alive, the consent has to ascertain whether the father is a fit person to be appointed as a guardian or he is a unfit person.

16. In the aforesaid position of law, I am not impressed by the arguments of the learned counsel for the Petitioners that merely because the father has consented for appointing the Petitioner Nos.1 and 2 as a guardian of child Faraz, the Court must automatically grant the Petition and effect such an appointment on the basis that the natural guardians are best aware of the welfare of the child.

17. In so far as the judgments relied upon by the learned counsel for the Petitioners is concerned, in my view the judgment in the case of *Anokha (Smt.) v.*

State of Rajasthan & Ors. has no application in the present case for the following reasons - firstly, in the said judgment, on the facts given in paragraph 2 it is clear that the father was dead and, therefore, the provisions of section 19 were not attracted. Secondly, in the whole judgment there is no discussion pertaining to the scope of section 19 of the Guardians and Wards Act, 1890 because the issue did not arise in that case. Thirdly, in the case before the Apex Court, the only ground on which the application was rejected by the lower Court was based on the guidelines framed by the State Government in pursuance of the judgment of the Apex Court in *Laxmi Kant v. Union of India* (supra) and the Apex Court came to the conclusion that merely because the guildelines are prescribed for adoption of Indian Children it is not open for the Court to reject the application for appointment of guardian but the Court must go into the issue whether it is in the interest of the child to appoint the persons as guardians or not. In that case, the Court also came to the conclusion that the guidelines which are relied upon do not apply to the facts of that case and, therefore, the Court directed appointment of the guardian. In the present case, the provisions of section 19 are directly attracted. In view

thereof, I do not find that the aforesaid judgment of the Apex Court can be applied to the facts of the present case.

18. The judgment in the case of *Laxmi Kant v. Union of India* is based upon inter-country adoption and the Court has provided the detailed guidelines for the purpose of steps to be taken before the children are adopted and their welfare which has to be looked into. The said judgment of the Apex Court, in my opinion, has no application to the present case. The judgment of the Single Judge of this Court in the case of *Mohammad Shafi* (supra) relied upon in the present case by the Petitioner in fact in paragraphs 11 and 12 consider the provisions of section 19 of the Act and clearly holds that unless the Court comes to the conclusion that under section 19 the natural guardian is dis-entitled to be appointed as a guardian because he is unfit, this Court cannot go into the welfare of the child and exercise jurisdiction under section 17 for appointment of a third party as a guardian. The view of the Calcutta High Court in the case of *Lovejoy Patell* that the power under the Guardians and Wards Act, 1890 is equivalent to the power of the Chancelley Court. In my view in that case, the

provisions of section 19(b) are not considered. The present case is based on the interpretation of section 19 of the Guardians and Wards Act, 1890. In my view, the judgments relied upon by the Petitioner has no relevance. Equally, the judgment of the Sindh Court which has been relied upon under section 19 also has no relevance inasmuch as it only holds that the provisions of section 17 and 19 must be read together. It is obvious that the enquiry conducted under section 19(b) and 17 of the Act to the extent over-laps because when the Court decides that the person is unfit under section 19(b) of the Act then such decision is obviously in the welfare of the child as contemplated under section 17 of the Guardians and Wards Act, 1890.

19. In the light of the aforesaid facts and position in law, I am of the view that the contention of the Petitioners that merely because there is a consent on the part of Petitioner Nos.3 and 4 to appoint the Petitioner Nos.1 and 2 as guardian of minor child Faraz cannot be accepted and I therefore reject the same. On the other hand, the judgment of the Privy Council in the case of *Mrs.Annie Besant* which has been cited by the learned counsel Ms.Diwan as Amicuis Curie has clearly held

as under :

> "And further, no order declaring a guardian could by reason of the 19th section of the Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case."

20. This takes me to the next question of facts whether the Petitioner has made out a strong case to hold that the father is unfit to be appointed as guardian as contemplated under section 19 of the Guardians and Wards Act, 1890. The learned counsel for the Petitioners, in this behalf has placed before me only two facts. Firstly, that the Petitioner Nos.3 and 4 are very poor and financially not well-off whereas the Petitioner Nos.1 and 2 are financially well to do and, therefore, it is in the interest of the child that the Petitioner Nos. 1 and 2 should be appointed as the guardian. The second contention raised is the consent which has been elaborately dealt with hereinabove.

21. In my view, the mere fact that the Petitioner Nos.1 and 2 are financially well-off could not be a ground for appointment of the Petitioner Nos.1 and 2

as a guardian or for holding that the father of the minor child Faraz is unfit to be appointed as the guardian of the said child. The judgment cited by the learned counsel for the Petitioners in the case of *Lovejoy Patell* in fact, on this aspect, states as under :

> "The Court of Chancery has recognized that generally speaking the best place for a child is with its parents. The Court of Chancery has never said merely because the parents are poor and the person who seeks to have the custody of the child as against the parents is rich, that without regard to the natural rights and feelings of the parents the child ought to be taken away from its parents merely because its pecuniary position will be thereby bettered."

22. Apart from the aforesaid view of the Calcutta High Court, I am also further of the opinion that is not possible to hold that merely because the parents are poor they are free to allow their own children to be adopted by others and/or that they should be permitted to appoint some third person as guardian as, it is well-known that the law recognizes the natural rights of the parents because it also recognises that natural natural duties of the parents.

23. In my opinion, the natural love and affection of the parent creates a proper atmosphere and circumstances for the purpose of good up-bringing of the child. In the present case, three children are already with the parents i.e. Petitioner Nos.3 and 4. They are already being looked-after and cared for and they have already attained the age of 14, 12 and 10 years. In view thereof, it is not possible for me to hold that the parents are not capable of performing their duties and that Petitioner Nos.3 and 4 are unfit to perform their duties towards the fourth child. In my view, the natural affection of the parents is absolutely essential and it is only because of this that they are treated as natural guardian of the child.

24. I do not find from the facts of this case any circumstances much less the compelling circumstances to hold that the Petitioner No.3 is unfit to be appointed as guardian and, in view thereof, I am of the opinion that under section 19 unless satisfaction is reached by the Court that the father who is living is unfit to be appointed as a guardian, it is not open for the Court to appoint Petitioner Nos.1 and 2 as guardian of the said newly

born child Faraz.

25. In the aforesaid circumstances, I see no merits in the aforesaid Petition. The Petition is accordingly dismissed. There shall be no order as to costs.